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No. 81-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

v. *Petitioner*,

THE DOW CHEMICAL COMPANY,

AND

NATIONAL LABOR RELATIONS BOARD.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE DOW CHEMICAL COMPANY IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded, on the facts of this case, that the Union materially breached the collective bargaining agreement when it struck the Company over a dispute hinging entirely on contract interpretation and fully susceptible to resolution through available grievance and arbitration procedures which the Union had failed to exhaust.

2. Whether the court of appeals, having found on the facts that the Union had materially breached the collective bargaining agreement, properly determined, as did the Labor Board in its initial decision, that the Company was entitled to resort to traditionally-approved economic measures in response, including cancellation of the breached agreement.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	(i)
OPINIONS BELOW	2
COUNTERSTATEMENT OF THE CASE	2
A. The Facts	2
B. Proceedings Below	4
REASONS FOR DENYING THE WRIT	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Arlan's Dept. Store of Michigan, Inc., 133 N.L.R.B. 802 (1961) 5, 10, 11, 13, 14
Atlantic Richfield Co., 199 N.L.R.B. 1224 (1972) .. 10
Boeing Airplane Co. v. Aeronautical Industries Lodge No. 751, Int'l Ass'n of Machinists, 188 F.2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, *aff'g* 91 F. Supp. 596 (W.D. Wash. 1950) 16
Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) 16
Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976) 16
Children's Rehabilitation Center, Inc. v. Service Employees Int'l Union, Local 227, 503 F.2d 1077 (3d Cir. 1974), *cert. denied*, 419 U.S. 1090 16
Dow Chemical Company v. I.U.E., 82 L.R.R.M. 3169 (M.D. Fla. 1971), *aff'd*, 480 F.2d 433 (5th Cir. 1973), *cert. denied*, 415 U.S. 932 11
Dow Chemical Company v. United Steelworkers etc. and NLRB, 429 U.S. 834 (1976) 2
Drake Bakeries, Inc. v. Bakery & Confectionery Workers, 370 U.S. 254 (1962) 11, 12
Kellstone, Inc., 206 N.L.R.B. 156, *enf'd*, 493 F.2d 1352 (6th Cir. 1974) 16
Marathon Electric Mfg. Co., 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Electrical Radio & Machine Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 .. 7, 8, 13, 14, 15, 16, 17
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) 10, 11, 12
NLRB v. C & C Plywood, 385 U.S. 421 (1967) 12
NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960) 17
NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974) 11
NLRB v. Northeast Oklahoma City Mfg. Co., 631 F.2d 669 (10th Cir. 1980) 12, 13, 14, 15, 16

TABLE OF AUTHORITIES—Continued

Page

NLRB v. State Electric Service, Inc., 477 F.2d 749 (5th Cir. 1973), *cert. denied*, 414 U.S. 911 ..... 12, 15, App. 1a, 2a

Pence Construction Co. v. Int'l Union of Operating Engineers, Local 450, 484 F.2d 398 (5th Cir. 1973), *cert. denied*, 414 U.S. 1144, *aff'g* 84 L.R.R.M. 2391 (S.D. Tex. 1972) 11

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 17

United Packinghouse Workers, Local 721 v. Needham Packing Co., 376 U.S. 247 (1964) .....12, App. 1a

Statutes:

National Labor Relations Act of 1935, as amended:

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 13

§ 8(a)(5), 29 U.S.C. § 158(a)(5) 13

§ 8(d), 29 U.S.C. § 158(d) 13

Miscellaneous:

Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1 (1958) 14

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BRIEF FOR THE DOW CHEMICAL COMPANY IN OPPOSITION

The Dow Chemical Company (hereinafter referred to as "the Company") respectfully requests that this Court deny the petition of the United Steelworkers of America, etc. (hereinafter referred to as "the Union" or "the Petitioner") for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

In addition to the opinions below which are cited at page 1 of the Petition for Certiorari, the Order of this Court in *The Dow Chemical Company v. United Steelworkers, etc. and NLRB*, 429 U.S. 834 (1976), which denied a petition for certiorari in this case, also bears upon this proceeding.

COUNTERSTATEMENT OF THE CASE

A. The Facts [1]

The petition contains several inaccuracies and omits certain crucial facts that directly affect the issues upon which certiorari is sought. One fundamental inaccuracy concerns the mischaracterization of the nature and significance of the Company's decision to implement a schedule change in its latex department.

Contrary to the Union's description, the Company did not "without any prior discussion" determine to "carry out a basic restructuring" of the latex department's method of operation. (Pet. Br. 3). Rather, as the factual summary of the court below makes clear (App. 4a), the essence of the Company's decision, and the only aspect of it which was presented to the Union as non-negotiable, was simply that the Company was going to stop running latex production on the weekends.[2] *How* this decision would be imple-

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[1] References to the appendix to the petition for certiorari are cited as "App.", followed by the appropriate page number. References to the joint appendix in the court below are cited as "JA", followed by the appropriate page number.

[2] The petition subtly inflates the impact of the schedule change. Thus, although the Union notes the approximate size of the bargaining unit involved (145 employees), it fails to

mented was left open to negotiation, as management representatives made clear by their repeated statements that they were "willing to discuss the mechanics" of going to a 5-day schedule. (App. 4a; JA 374, 510). And, indeed, Company officials spent at least eight hours at the table with the Union's committee trying to resolve the dispute before the change was slated to take effect. (JA 55, 110, 127, 248).

Important events surrounding the abandonment of the contractual grievance and arbitration procedures have also been omitted from the petition's factual summary. As set out, in relevant part, in the opinion below (App. 5a-6a), Article VII of the contract provides a five-step grievance procedure. Should the dispute not be resolved by the grievance procedure, the contract then provides that the problem may, upon the consent of the Company and Union bargaining committees, be submitted to an arbitrator. (App. 5a). The contract also contains a no-strike clause which unqualifiedly states that the Union and its members will not engage in any strike or work stoppage unless and until there has been a completion and exhaustion of all five steps of the grievance procedure, followed by arbitration of the dispute or rejection by the Company of a timely, written request for arbitration. (App. 6a).

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mention that the Company's decision affected only 16 employees. (App. 4a). Similarly, although the petition recites conflicting testimony on the financial effect of the schedule change on employees, it fails to note that the far more conservative figure of $570 annually was presented by a witness, Superintendent Gay, whose testimony was credited by the Administrative Law Judge. (App. 132a-133a).

Between May 21, 1971, and June 3, 1971, four steps of the grievance procedure were completed. (App. 6a, 135a-137a). Following the Step 4 meeting on June 3,[3] and continuing through the time of the contract cancellation on August 9, 1971, the Union made no attempt to pursue the contract grievance procedure further. No written request for a Step 5 meeting was ever made, and there is no indication in the record of any oral request for such a meeting. (JA 415). No meeting of the Company and Union committees at Step 5 was ever held, as required by the contract, and no written request for arbitration was made during this period. (App. 6a-9a).

B. Proceedings Below

In describing the decision below (*"Dow II"*), the petition asserts that "the court did not purport to disturb the Board's findings that the Company's initial unfair labor practice was 'serious' or that 'the onus for the strike must be placed upon the [Company].'" (Pet. Br. 10). This is a misleading description of the opinion. The *Dow II* opinion, in fact, deprecates both the legal and the factual premises of the Board's supplemental decision.

The Board's initial decision had upheld the Administrative Law Judge's determination that the Company's pre-strike conduct constituted a non-serious

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[3] The petition unaccountably notes two different dates when the Company's schedule changes were supposed to go into effect, May 31, 1971, and June 7, 1971. (Pet. Br. 4). In fact, the Record manifestly shows that the Company postponed implementation of the schedule change for an extra week specifically to allow further discussion. The Union, however, made no counterproposal whatsoever. (JA 475).

unfair labor practice, a legal conclusion that *Dow I* did not overrule and which ultimately established the strike as a material breach of contract under the Board's *Arlan's* rule.[4] When the Board, on remand, reversed itself and declared the same conduct "serious," it purported to turn a strike in breach of contract into protected activity, a conclusion the court in *Dow II did* reject. (App. 18a-19a). The court thereby effectively invalidated the Board's characterization of the Company's conduct as "serious."

The *Dow II* court's recitation of the facts also reflects an implicit rejection of the Board's conclusion placing onus for the strike upon the Company. The court describes repeated efforts of the Company, both before and after the strike, to convince the Union to pursue the grievance and arbitration procedures to completion. (App. 4a-11a). Among such efforts, the court's recitation includes the following:

(a) "[T]he Union was notified of the proposed change. . . . Dow's personnel manager indicated that . . . he was willing to discuss implementation of the change. . . . (App. 4a).

(b) "[T]he parties completed the first four steps of the grievance procedures. . . . At [the Step 4] meeting a union representative orally suggested immediate arbitration, and the company responded by urging the Union to pursue the contract grievance machinery." (App. 6a).

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[4] *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961).

(c) "On June 11, [the plant manager] wrote to the employees, advising them . . . 'that the resolution to the problem lies in the grievance and arbitration procedure and [I] ask you to encourage your Union leadership to return to the legal and in my opinion morally right means of solving this problem.'" (App. 7a).

(d) "Meanwhile [the Company] requested the assistance of the Connecticut state mediation service, and, on July 26, 1971, advised the State Labor Commissioner that it was willing to submit the labor dispute resulting in the strike to arbitration or mediation. The Union was made aware of Dow's willingness to arbitrate or mediate. . . ." (App. 7a-8a).

(e) "Despite notice of Dow's willingness to arbitrate even after expiration of the time limits specified in the contract, the Union continued the strike." (App. 8a).

Nothing in the *Dow II* opinion suggests that the court of appeals agreed that the Company's pre- or post-strike conduct warranted opprobrium. Thus, while the *Dow II* opinion perhaps does not explicitly reject the Board's accusation of "serious" wrongdoing by the Company, a fair reading of the court's opinion is entirely antithetical to such a finding.

Since the court of appeals did *not* uphold the Board's finding that the Company engaged in a "serious" unfair labor practice, the principal issue which the Union seeks to raise is not genuinely presented by this case. The legal consequences of a "serious" unfair labor practice committed by an employer were

not the subject of the court's decision. Rather, the court specifically held only that *if*: (1) the very existence of an unfair labor practice hinges entirely on contract interpretation; *and* (2) the parties have set up a peaceful mechanism to resolve questions of contract interpretation; *and* (3) the parties have agreed there will be no strike unless and until that process has been exhausted, *then* a strike without first exhausting that process is a material breach of contract.

The Union's description of a "second" facet of the *Dow II* decision is also misleading. Contrary to the Union's assertion, the court did not reverse a holding of *Dow I* with respect to the doctrine enunciated in *Marathon Electric Mfg. Co.*, 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Electrical Radio & Machine Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981. The *Marathon Electric* rule explicitly acknowledges the right of a company to exercise the traditional breach-of-contract remedy of cancellation where a union materially breaches its no-strike commitment. As the *Dow II* opinion explains, the court in *Dow I* pointedly questioned the doctrine (App. 20a) but remanded the case to the Board for its views. When the Board failed to address the issue, the court thought compelled for the first time to decide it.[5] The court there-

[5] In rejecting Board counsel's argument that it should once again remand the case to the Board for consideration of the *Marathon* doctrine, the court of appeals observed, *inter alia*, that it had "already sought, and did not receive, enlightenment from the Board" on that issue; that its "own careful review of the record" established that "the discharge of strikers and the termination of the contract could not be found to

upon addressed *Marathon Electric* squarely and ruled, as did the Board in its initial decision in this case, that the doctrine of material breach of labor contracts "continues to fill an important need in the law of labor contracts." (App. 21a).

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and not in conflict with other decisions. In addition, as the case now comes before this Court, this ten-year-old proceeding presents only a narrow factual question without significance for other cases. That there is no issue warranting review by this Court is buttressed by the fact that the agency primarily responsible for enforcing the Labor Act has decided not to request further review in this case.

1. The uniqueness of the factual setting in this case is plain from the record. Indeed, five years ago, when the Company sought a writ of certiorari to review the court of appeals' decision in *Dow I*, the Union responded in its brief in opposition that "[t]his case involves a unique set of facts and doctrines of law which are rarely invoked . . ." (Union Opp. Cert. at 6 in Sup. Ct. No. 75-1895). *Dow II* involves the same set of facts and doctrines of law as *Dow I*. The only real difference is that the court in *Dow II* realized "on considered reflection" that this case was not "an ideal vehicle for exploration of all the issues in the interrelationship between the law

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be unfair labor practices;" and that a "remand solely for consideration of a bargaining order at this late stage in the history of the Allyn's Point plant would not advance the cause of free choice in the selection of a bargaining representative." (App. 21a-22a).

of unfair labor practices and that of contract remedies which [the *Dow I* opinion) posed." (App. 22a).[6] Accordingly, the court in *Dow II* tailored its decision narrowly to the record before it and did not undertake to explore esoteric issues or establish any new legal principles. Instead, it merely adhered to long-standing judicial precedents defining the rights of employers faced with breach-of-contract strikes—precedents which, although cited infrequently in recent years, have not been overruled or modified by the Labor Board or any court.

2. Contrary to the Union's assertion, the decision below is entirely consistent with labor law principles enunciated by this Court. In particular, the decision of the court of appeals represents no departure from

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[6] The Company had petitioned this Court for review in *Dow I* because the court of appeals' decision appeared to interpret the federal labor policy favoring arbitration as imposing new preconditions which an employer would have to satisfy before resorting to traditionally-approved economic measures in response to a breach-of-contract strike. The Board successfully opposed the petition on the ground that the court had not held that the Company's responses to the strike were "necessarily unlawful", but merely remanded the case to the Board for further consideration. (See App. 3a, n.3). On remand, however, the Board reversed its earlier finding that the Union's strike violated the contract. In doing so, the Board eliminated the predicate on which the court of appeals had based its decision in *Dow I*. Hence, it never addressed the issues which had concerned the court and prompted the Company's certiorari petition. Consequently, those issues were not before the court in *Dow II*, and it concentrated instead on the narrow question of whether the Board had erred in finding, on this record, that the strike was not in breach of the contract. (App. 12a).

this Court's ruling in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In *Mastro Plastics*, this Court held that even though the parties had negotiated a broad no-strike clause which prohibited "any strike" during the term of the collective bargaining agreement, the union was not prohibited from striking to protest "those . . . unlawful practices destructive of the foundation on which collective bargaining must rest." 350 U.S. at 281. But in words that anticipate the facts here, this Court explained that the no-strike clause "expresses concern for the continued operation of the plant and has a natural application to strikes and work stoppages *involving the subject matter of the contract.*" 350 U.S. at 281, *cited at* App. 15a (emphasis added by Third Circuit).

The Board's subsequent interpretation of *Mastro Plastics* in *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961), is fully consistent with the language quoted above. The Board in *Arlan's* determined that not every discharge or unilateral action by an employer would be considered a material breach of the contract which would excuse a union from continued adherence to its no-strike obligations, since a union has a remedy which it may pursue by submitting the dispute to the grievance-arbitration procedure. 133 N.L.R.B. at 808. *See also Atlantic Richfield Co.*, 199 N.L.R.B. 1224 (1972) (unlawful unilateral changes in conditions of employment and resultant suspension of employees who refused work assignments, deemed non-serious unfair labor practice).

The interpretation of *Mastro Plastics* upon which the Board based its holding in *Arlan's* has been con-

firmed in decisions of this Court.[7] Thus, in *Drake Bakeries, Inc. v. Bakery & Confectionery Workers*, 370 U.S. 254, 265 (1962), this Court said, in explaining *Mastro Plastics*, that it "involved a *flagrant* unfair labor practice by the Company threatening the very existence of the union itself," and that "the parties could not have intended to waive the employees' right to strike over a *flagrant* unfair labor practice" (emphasis added). In 1974, this Court once again underscored the appropriate ambit of *Mastro Plastics* as applicable only to "unlawful practices destructive of the foundation on which collective bargaining must rest." *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974), *citing* 350 U.S. at 357.[8]

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[7] The *Arlan's* application of *Mastro Plastics*, so as to make unlawful strikes precipitated by discharge actions that could have been resolved through contractual grievance procedures, also has enjoyed substantial judicial approval among the lower federal courts for the last twenty years. See *Dow Chemical Company v. I.U.E.*, 82 L.R.R.M. 3169, 3181 (M.D. Fla. 1971), *aff'd*, 480 F.2d 433 (5th Cir. 1973), *cert. denied*, 415 U.S. 932; *Pence Construction Corp. v. Int'l Union of Operating Engineers, Local 450*, 484 F.2d 398, 401 (5th Cir. 1973), *cert. denied*, 414 U.S. 1144, *aff'g* 84 L.R.R.M. 2391 (S.D. Tex. 1972).

[8] The Petitioner's attack against the Third Circuit's interpretation of *Mastro Plastics* and *Arlan's* is based less upon legal arguments than upon a belated rehash of whether the Company's pre-strike activity constituted a "serious" unfair labor practice, thus triggering a statutory violation remediable by the Board. (Pet. Br. 13 n.11). The record on this matter, however, is clear: faced with the same case on two occasions, Board proceedings resulted in determinations that the Company's actions were "non-serious" and "serious," respectively. The court of appeals approved only one determination: the initial finding of non-seriousness. Accordingly, the Union's

Other decisions of this Court cited by the Petitioner are simply irrelevant to the facts of this case. Both *Drake Bakeries v. American Bakery & Confectionary Workers*, 370 U.S. 254 (1962), and *United Packinghouse Workers, Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964), concerned the survival of arbitration, not the employer's right to cancel the contract in the face of a material breach. Moreover, those cases concerned suits by unions to compel unwilling employers to follow arbitration procedures. In this case, on the other hand, it was the Union that spurned the opportunity for compromise, abandoned the grievance procedure as soon as it became clear it could not force capitulation in advance through that route, and struck the plant. The record is replete with evidence supporting the court of appeals' determination that the Company remained willing to arbitrate "even after expiration of the time limits specified in the contract. . . ." (App. 8a).

3. The Union's contentions that the decision below is in conflict with *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (10th Cir. 1980),[9] and with *NLRB v. State Electric Service, Inc.*, 477 F.2d

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complaint concerning an unremedied statutory violation, based on *Mastro Plastics* and *NLRB v. C & C Plywood*, 385 U.S. 421 (1967), is academic, because the court below *never* concluded that a serious unfair labor practice occurred.

[9] The *Northeast Oklahoma City* case enforced a Board decision issued on July 6, 1978, and published at 236 N.L.R.B. 1358. Yet, the Board did not rely on the administrative determination as precedent for its Supplemental Decision, and it was not discussed or even cited in any of the parties' briefs to the court of appeals.

749 (5th Cir. 1973), *cert. denied*, 414 U.S. 911, are without merit. Both of those cases, which were brought to the attention of the court of appeals but were not even cited, let alone discussed by the court (or the dissent), are plainly distinguishable.

In *Northeast Oklahoma City*, a group of employees struck in protest against their employer's repeated failure to comply with a contractual obligation to pay bonuses by the middle of each month. The employer immediately discharged all the strikers, claiming their walkout violated the no-strike clause of its labor contract. The Board found that the employer's repeated delays in paying the bonuses amounted to a unilateral change of working conditions and a modification of contract terms in violation of Sections 8(a)(5) and 8(d) of the Act. It went on to conclude that the discharge of the strikers violated Section 8(a)(3), because the circumstances brought the case within *both* of two rules: (1) the *Arlan's* rule that strikes over "serious" unfair labor practices are immune from general no-strike clauses, and (2) the *Marathon Electric* rule that a material breach of a labor contract by one party releases the other party from its obligation to perform. 236 N.L.R.B. at 1362 and nn.14, 15. In the latter regard, the Board reasoned that the employees were excused from their no-strike obligations because the Company's conduct constituted a prior material breach of the contract. These determinations were approved by the Tenth Circuit.

Northeast Oklahoma City, then, is a direct counterpart to this case. Here, the first and only material breach of contract was committed by the Union when it struck absent any precipitating serious unfair labor

practices.[10] The application of *Marathon*, of course, is consistent. Here, the Company was no longer obliged to adhere to its contract, any more than the

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[10] To the extent that the *Northeast Oklahoma City* decision rests alternatively on the finding that the employer's Section 8(a)(5) violation was a "serious" unfair labor practice under *Arlan's*, the facts emphasized by the Board and the court of appeals clearly differentiate that case from this one. One factor both the Board and the court stressed was the recurrent nature of the company's contract violations over a period of months. 631 F.2d at 671-72, 676; 236 N.L.R.B. at 1362. The management in that case kept promising that bonus payments would be made on time and then kept failing, month after month, to keep its promises. *Id.* at 671-72. Such a course of conduct could well be expected to create a sense of growing frustration among the employees. Thus, as the court saw it, the final event that triggered the strike was not just a unilateral change and a breach of contract, but was "[t]he apocryphal straw that broke the camel's back." *Id.* at 672 Further exacerbating the seriousness of the situation were the employer's repeated failures to notify the union when bonus checks would be late, and the employer's "demonstrated unwillingness to resolve the matter through the collective bargaining process." *Id.* Indeed, the court noted that when a union steward sought to discuss the problem with the company's president, he refused to meet with her. *Id.* at 672. These facts clearly set *Northeast Oklahoma City* apart from the ordinary run of cases involving "unwarranted bits of unilateral action." See *Arlan's Dept. Store of Michigan, Inc.*, 133 N.L.R.B. at 806 (1961), *quoting from* Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 17 (1958).

The case at bar, however, involved only a single, isolated instance in which management and union representatives disagreed on an issue of contract interpretation and management decided to adhere to its view, while recognizing the union's right to pursue a different resolution through the grievance

employees in *Northeast Oklahoma City* were required to comply with their no-strike pledge, after the other party's material breach.

The Union's attempts to draw parallels between this case and *State Electric Service* already have been satisfactorily refuted before in this case: once by the Administrative Law Judge (App. 150-51a) (whose decision was initially affirmed by the Board) and again by the Board's General Counsel in his initial brief before the Third Circuit on cross-application for enforcement of the Board's original order. The General Counsel's argument explaining the inapplicability of *State Electric Service* is reproduced in Appendix A, *infra*.

4. Finally, the Union suggests that the *Marathon Electric* rule itself is wrong and, presumably, that this Court should grant review to consider whether the rule is consistent with national labor policy. Since this case involves only the straightforward and unremarkable application of a 30-year-old rule of labor

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procedure. Unlike the management officials in *Northeast Oklahoma City*, the Dow Company's representatives neither broke any promises to the union nor refused to meet with it. On the contrary, they spent a total of at least *8 hours* at the table with the union's committee trying to resolve the dispute before the change was slated to take effect. See JA at 55, 110, 127, 248. They also clearly made known their willingness to continue seeking a binding resolution thereafter through that part of the bargaining process best-suited for resolving such issues—*i.e.*, the agreed-upon grievance and arbitration procedures. (*E.g.*, JA at 172, 190, 261, 397). This is not, therefore, a case like *Northeast Oklahoma City*, where the employer's "unwillingness to resolve the matter" could reasonably be found to have undermined the bargaining process itself.

law, in which there is no conflict with other circuits, this argument, we submit, is meritless.[11]

For the record, however, we note that the *Marathon Electric* rule is a crucial corollary to this Court's decision in *Boy's Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). In *Boy's Market*, which approved enjoining strikes in violation of no-strike commitments where a bargaining agreement specified mandatory arbitration, this Court expressly acknowledged that where, as here, mandatory arbitration is unavailable, self-help measures remain an appropriate avenue of relief. 398 U.S. at 248, n.17. This Court referred specifically to the right of employees to discharge participants in a breach-of-contract strike as a right which "of course . . . would remain available. . . ." *Id.*

This principle was reaffirmed in *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), when the Court made clear that "enforcing promises to arbitrate . . . was the limit of *Boy's Market*," and that the federal labor policy does not require or support any additional judicial regulation of the parties' "relationship pending arbitration"

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[11] In addition to the case at bar, the *Marathon Electric* rule has been confirmed by the federal courts on numerous occasions. *See, e.g., Children's Rehabilitation Center, Inc. v. Service Employees Union, Local 227*, 503 F.2d 1077 (3d Cir. 1974), *cert. denied*, 419 U.S. 1090; *Boeing Airplane Co. v. Aeronautical Industries Lodge No. 751, Int'l Ass'n of Machinists*, 188 F.2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, *aff'g* 91 F. Supp. 596 (W.D. Wash. 1950); *Kellstone, Inc.*, 206 N.L.R.B. 156, *enf'd*, 493 F.2d 1352 (6th Cir. 1974); *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (10th Cir. 1980).

unless specifically provided for by their agreement. 428 U.S. at 411.

To be sure, federal labor policy prefers peaceful dispute-settlement methods over self-help remedies. At the same time, however, the availability of self-help remedies provides the underlying impetus upon which the collective-bargaining system functions. Well after *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court underscored the significance of having available self-help remedies, a primary example of which is the *Marathon Electric* rule. Thus, in *NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960), this Court observed that the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." 361 U.S. at 489.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt of NLRB Brief in *United Steelworkers v. NLRB*, 530 F.2d 266, Third Circuit No. 74-2163 (1976) (pages 33-35; citations omitted):

> "[*State Electric*] was decided on factual grounds—to wit, that there was no genuine breach of contract by the union. Thus, the Board found that the applicable no-strike clause was very limited and that it did not proscribe the strike engaged in by the union. Furthermore, the Board found that the strike occurred as a result of the company's failure to respond to the Union's request for recourse to the contractual procedure. 198 NLRB No. 77, 80 LRRM 1763, 1764-5 (1972). In addition, after the commencement of the strike the union still sought to resolve the dispute through the contractual procedures. On these facts, the Board found that "the union's conduct did not absolve the [company] from further obligation to deal with the union" and that the company violated the Act by repudiating the contract. None of the circumstances relied on by the Board in *State Electric* are present in the instant case. Moreover, in *State Electric*, as in *Needham*, *supra*, the fact that the union was seeking to work within the contract grievance machinery and that the employer refused to utilize that process was deemed to be of paramount importance.
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> "On appeal, the Fifth Circuit held that substantial evidence supported the Board's findings and granted enforcement of its order. The Court went on to add its view that breach of a no-strike

clause does not *automatically* . . . terminate the entire contract (emphasis added) 477 F.2d at 752. Thus, the court implicitly recognized that in some circumstances breach of a no-strike clause would justify rescission. However, the court stated that under the circumstances present in *State Electric* there was not a sufficient justification to void the contract. The specific factors relied on by the court were the same ones emphasized by the Board. Thus the court stressed that the strike was clearly designed to force the company to acknowledge the existing dispute and comply with the contract procedures and that it was not an attempt to force the employer's acquiescence to an issue which the arbitrator could decide. 477 F.2d at 751. The Court summed up the case by concluding that it involved a situation in which an employer simply decided to take this opportunity to rid himself of the union once and for all. 477 F.2d at 752.

"In contrast, the instant case is not one in which the Company was trying to get rid of the union, for here there is no evidence whatsoever of anti-union animus on the part of the Company. Moreover, it was not the company but rather the union that refused to comply with the grievance procedure. The Company's cancellation of the contract was not a sudden or hasty decision. Thus the Company made strenuous efforts to persuade the union to resolve the dispute through peaceful means. During the three-way telephone conversation on June 4, Industrial Relations Manager Neering advised Union Representative McDermott "not to do anything foolish,

follow the grievance procedure." Once the strike began, the Company, in a series of letters, consistently advised the employees of its position that the proper means to resolve the dispute was through the grievance procedure and urged them to end the strike and complete the procedure. Additionally, the company's efforts to resolve the dispute through the state mediation procedure proved unsuccessful. At no time did the union give any indication that it would consider ending the strike and completing the grievance procedure. Thus, it can hardly be said (U. Br. 54) that the Union was seeking to achieve arbitration. On the contrary, its attitude and conduct prevented arbitration.

"In view of the Company's inability over a nine-week period to convince the employees to end the strike and complete the grievance procedure, and in light of the other factors which the Company believed were preventing it from returning the plant to normal, the Company was pushed to the point where contract rescission became an appropriate remedy. In sum, the Union's breach of contract here went to the very heart of the collective bargaining agreement and consequently, in the circumstances of this case, was the type of breach that justified rescission."